Supreme Court, U.S.
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No. 95-847

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS GAMBINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a violation of the 70-day time limit of the Speedy Trial Act, 18 U.S.C. 3161(c)(1), can constitute harmless error.

2. Whether the time between petitioner's filing of a pretrial motion to dismiss the indictment based on *Kastigar* v. *United States*, 406 U.S. 441 (1972), and the hearing on the motion, after the trial, constituted excludable "delay resulting from any pretrial motion" under 18 U.S.C. 3161(h)(1)(F).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 59 F.3d 353. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 82a-108a) is reported at 818 F. Supp. 541. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 32a-81a) is reported at 835 F. Supp. 74.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1995. A petition for rehearing was denied on September 8, 1995. Pet. App. 109a. The petition for a

writ of certiorari was filed on November 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of participating in the conduct of the affairs of an enterprise engaged in a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); and conspiring to do so, in violation of 18 U.S.C. 1962(d). He was sentenced to 60 months' imprisonment, to be followed by five years of supervised release, and fined $100,000. Gov't C.A. Br. 1.

1. The government's evidence at trial established that petitioner was a captain in the Gambino Family of La Cosa Nostra who supervised illegal gambling and loansharking businesses in Connecticut. Petitioner reported to John Gotti, the boss of the Gambino Family, and regularly conversed with Gotti and other members of the Gambino Family. Most conversations took place in New York, at the Ravenite Social Club (which served as the Gambino Family's headquarters) or at the Bergin Hunt and Fish Club. Video surveillance tapes captured petitioner regularly visiting the Ravenite Social Club, and they frequently showed petitioner conversing with Gotti and other members of the Gambino Family while they walked outside the club. Salvatore Gravano, a Gambino Family "consigliere" who participated in many recorded conversations and who had entered into a cooperation agreement with the government, also testified about

petitioner's role in the Gambino Family. Pet. App. 3a, 20a; Gov't C.A. Br. 4-13.[1]

2. a. On December 12, 1990, petitioner, John Gotti, Salvatore Gravano, and Frank Locascio were indicted. Petitioner was arraigned the same day and released on bail. On December 21, 1990, the district court concluded that the complexity of the case warranted an extension of the time deadlines imposed by the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, and entered an order of excludable delay in accordance with 18 U.S.C. 3161(h)(8)(A). On June 7, 1991, the court reaffirmed its finding of excludable delay under the Speedy Trial Act, again relying on the complexity of the case. Pet. App. 4a; Gov't C.A. Br. 15.

b. On June 26, 1991, petitioner moved to dismiss the indictment on the ground that a portion of the government's proof was derived from his immunized testimony before a prior grand jury. The district court reserved decision on the motion and deferred holding an evidentiary hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), until after the trial.[2] The court scheduled the trial to begin on September 23, 1991, but counsel for two co-defendants were disqualified shortly before trial. The replacement counsel requested a postponement of the trial date, petitioner did not object, and the court rescheduled the trial for January 20, 1992. On October 3, 1991, the court ruled that the period between

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[1] The government's evidence at trial is set out in the district court's opinion denying petitioner's motion for new trial. See Pet. App. 34a-45a.

[2] On July 16, 1993, the district court held the hearing and denied the motion. Pet. App. 4a-5a; Gov't C.A. Br. 16. See pp. 8-9, *infra*.

October 3, 1991, and January 20, 1992, was excludable delay arising from the complexity of the case. Pet. App. 5a; Gov't C.A. Br. 16.

c. The new trial date created a new scheduling problem because the State of New York had intended to try petitioner on other criminal charges in January 1992. The government moved to sever petitioner's trial and petitioner did not object. On October 23, 1991, the district court granted the severance. Shortly thereafter, co-defendant Gravano entered into a cooperation agreement with the government and pleaded guilty to a superseding information. Co-defendants Gotti and Locascio went to trial on January 21, 1992, and were found guilty on April 2, 1992. Pet. App. 5a; Gov't C.A. Br. 16.

d. On August 4, 1992, the government unsealed a superseding indictment that charged petitioner with additional offenses and added two new co-defendants, Giuseppe Gambino and Philip Loscalzo. On August 21, 1992, the government informed the court that it would be prepared to go to trial on the superseding indictment within 70 days. Petitioner's co-defendants, however, requested a trial date after the second week of January 1993. The district court set the trial for February 1, 1993. It also entered an order of excludable delay, based on the continuing complexity of the case, as to the intervening time until trial. Pet. App. 5a; Gov't C.A. Br. 16-17.

e. On September 24, 1992, petitioner moved for a severance of his trial or for a postponement of the trial date until the conclusion of a conflicting trial in which his counsel was involved. Petitioner's counsel told the district court that "if this case went in May [1993] instead of February [1993] it would not be the end of the world." Pet. App. 5a; Gov't C.A. Br. 17-18.

The court, however, denied both motions. Two weeks later, on October 9, 1992, petitioner renewed his motion for a postponement of the trial date. His counsel again informed the court that "[o]ur case doesn't involve any speedy trial problems." Pet. App. 6a; Gov't C.A. Br. 18 (emphasis omitted).

3. On December 7, 1992, petitioner moved to dismiss the superseding indictment because he had not been tried on the original indictment within the 70-day time limit of the Speedy Trial Act, 18 U.S.C. 3161(c)(1). He asserted that the speedy trial clock had run during the 124-day period between the conclusion of the trial of his original co-defendants on April 2, 1992, and the filing of the superseding indictment on August 4, 1992. Petitioner did not seek dismissal of the charges with prejudice, but rather requested that he be tried alone on the original indictment. Pet. App. 6a; Gov't C.A. Br. 18.

The district court denied petitioner's motion. Pet. App. 82a-108a. The court ruled that, in light of the sequence of events leading up to the motion, petitioner was estopped from asserting his claim that the Speedy Trial Act had been violated. *Id.* at 89a-98a. The court observed that the remedy sought by petitioner "ma[de] plain that his real objective [was] to obtain a severance and, towards that end, [he] brandishes the Speedy Trial Act as a sword." *Id.* at 94a. It stated that "[w]ere this court to grant [petitioner's] motion to dismiss, it would grant that motion without prejudice." *Id.* at 95a. The court added that "[i]t would surely be a mockery of our criminal justice system if that system would require [petitioner] to be reindicted after a dismissal without prejudice." *Id.* at 96a.

The court also found it "readily apparent that had the government moved to dismiss the indictment immediately upon the conclusion of the original trial, the intervening period [until the superseding indictment was returned] would have been excludable from the Speedy Trial Act calculation pursuant to [18 U.S.C. 3161(h)(6)] and there would be no violation of that Act." Pet App. 97a. The court concluded that "to apply the Speedy Trial Act in the current context would surely be exalting form over substance * * * [and] would also affirm the view that such an application of the Speedy Trial Act would make a mockery of our criminal justice system." *Id.* at 97a-98a.

Alternatively, the district court ruled that no Speedy Trial Act violation occurred because petitioner's speedy trial clock was reset to zero under 18 U.S.C. 3161(h)(7) when the superseding indictment added two new co-defendants. Pet. App. 98a-102a. The court found that "[t]he indictment of the[] codefendants four months after the Gotti trial ended, judged by the totality of the circumstances explained by the government, * * * for the purpose of achieving a joint trial was plainly reasonable." *Id.* at 100a.

4. The court of appeals concluded that petitioner's trial did not commence within the time limits set by the Speedy Trial Act, but nevertheless affirmed petitioner's conviction. Pet. App. 1a-31a.

The court of appeals found that the 70-day time limit of the Speedy Trial Act expired during the 124-day period between the conclusion of the trial of his original co-defendants on April 2, 1992, and the filing of the superseding indictment on August 4, 1992. Pet. App. at 6a-17a. It rejected the government's argument that the 124-day period constituted excludable

delay within the scope of the December 1990 and August 1992 orders entered by the district court pursuant to 18 U.S.C. 3161(h)(8)(A) based on the complexity of the case. Pet. App. 6a-9a. The court also rejected the government's argument that petitioner's speedy trial clock was tolled pursuant to 18 U.S.C. 3161(h)(1)(F) when he filed his pretrial *Kastigar* motion in June 1991. Pet. App. 9a-11a. The court additionally rejected the government's argument that petitioner had waived the protection of the Speedy Trial Act because his counsel deliberately sought to delay the trial. *Id.* at 11a-16a. Finally, the court rejected the government's argument that the joinder of the two new co-defendants in the superseding indictment reset petitioner's speedy trial clock under 18 U.S.C. 3161(h)(7), observing that the joinder occurred "only *after* the challenged delay." Pet. App. 16a-17a. The court of appeals accordingly concluded that the district court erred in not finding that the Speedy Trial Act had been violated. *Ibid.*

The court of appeals ruled, however, that the error was harmless. Pet. App. 17a-19a. The court explained that "[i]f a criminal defendant is not brought to trial within 70 non-excluded days from the filing of an indictment, the mandatory remedy provided by the Act is dismissal of the indictment on motion of the defendant, although the court may, within its discretion, dismiss the case without prejudice." *Id.* at 17a. The court observed, however, that the issue in this case was "what relief is available to a defendant when the original indictment's time on the speedy trial clock has run out, but in the meanwhile a superseding indictment has been filed by the time defendant moves for dismissal of the original indictment." *Id.* at 18a.

The court of appeals agreed with the district court "that dismissal with prejudice would not have been warranted." Pet. App. 18a. "Given [the] dismissal without prejudice," the court stated, "the government would have been free to seek to have [petitioner] reindicted; and even [petitioner] now concedes that reindictment would have been inevitable." *Id.* at 19a. The court therefore concluded that the district court's failure to dismiss the indictment without prejudice "was harmless and [petitioner's] conviction must stand." *Ibid.* The court added that its holding was "not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a 'without prejudice' analysis is undertaken as mandated by the Act, will routinely follow." *Ibid.* "On the contrary," the court explained, "since we review the question of prejudice *de novo*, non-dismissal in the event of a violation will always risk nullifying an entire trial." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-24) that the court of appeals erred in holding that a violation of 18 U.S.C. 3161(c)(1) is subject to harmless error analysis. He also contends (Pet. 25-27) that there is a conflict in the circuits concerning whether the entire time period during which a deferred pretrial motion is pending constitutes excludable delay under 18 U.S.C. 3161(h)(1)(F). Neither contention warrants this Court's review.

1. Petitioner's arguments are premised on the court of appeals' finding of a Speedy Trial Act violation. In our view, however, the court's finding is incorrect. The Speedy Trial Act requires that a defendant be tried "within seventy days" of the later

of either the filing of an indictment or information, or the defendant's first appearance before a judicial officer. But the Act excludes from that 70-day period "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).

In *Henderson* v. *United States*, 476 U.S. 321, 330 (1986), the Court indicated that the effect of that provision is to exclude "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" Here, petitioner filed a motion to dismiss the indictment on June 26, 1991, based on *Kastigar* v. *United States*, 406 U.S. 441 (1972). See p. 3, *supra*. The district court held a hearing on that motion after the trial on July 16, 1993. Because the period between June 26, 1991, and July 16, 1993, constituted excludable delay under Section 3161(h)(1)(F), no violation of the Speedy Trial Act occurred in this case.

The court of appeals rejected the government's argument that the entire period during which petitioner's *Kastigar* motion was pending constituted excludable delay under Section 3161(h)(1)(F). Pet. App. 9a-11a. Instead, the court agreed with the reasoning of the Ninth Circuit in *United States* v. *Clymer*, 25 F.3d 824, 830 (9th Cir. 1994), which held that Section 3161(h)(1)(F) "applies only when the delay in bringing the case to trial is the *result* of the pendency of a pretrial motion." As petitioner notes (Pet. 25), the Second Circuit's decision in this case and the Ninth Circuit's decision in *Clymer* conflict with decisions of the Fourth and Eleventh Circuits. See *United States* v. *Beard*, 41 F.3d 1486, 1489 (11th

Cir. 1995); *United States* v. *Riley*, 991 F.2d 120, 124 (4th Cir.), cert. denied, 114 S. Ct. 392 (1993).[3]

Contrary to petitioner's contention (Pet. 25-27), however, this case is not a suitable one for resolving that conflict among the courts of appeals. Petitioner prevailed on that issue, and there is no reason for this Court to review the issue at the prevailing party's insistence. Moreover, even if the entire period during which petitioner's *Kastigar* motion was pending did not constitute excludable delay, no violation of the Speedy Trial Act occurred in this case for at least two other reasons.

First, the 124-day period between the conclusion of the trial of petitioner's original co-defendants on April 2, 1992, and the unsealing of the superseding indictment on August 4, 1992, was excludable pursuant to the "ends of justice" continuance entered by the district court on December 21, 1990. Under 18 U.S.C. 3161(h)(8)(A), the district court was authorized to grant the continuance after finding that "the ends of justice served by taking such action outweigh[ed] the best interest of the public and the defendant in a speedy trial." See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 236 (1985). Here, the district court found that the continuance was justified because the case was "complex" within the meaning of Section 3161(h)(8)(B)(ii).

The court of appeals "th[ought] the December 1990 order [was] best understood as having been made in

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[3] The decision here and the Ninth Circuit's decision in *Clymer* also conflict with decisions of the Fifth and Tenth Circuits. See *United States* v. *Gutierrez*, 48 F.3d 1134, 1136 (10th Cir. 1995); *United States* v. *Young*, 45 F.3d 1405, 1411 & n.6 (10th Cir. 1995); *United States* v. *Bermea*, 30 F.3d 1539, 1568 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995).

contemplation of the commencement of the trial on the original indictment" (Pet. App. 8a), but the complexity of the case against petitioner was not resolved by the trial of his original co-defendants. Indeed, even after petitioner's trial was severed on October 23, 1991, the case against him involved review of four separate court-authorized electronic surveillances conducted between 1985 and 1990, as well as hundreds of hours of video surveillance conducted over the same time period. See Gov't C.A. Br. 29-30. Moreover, although the district court stated (Pet. App. 89a) that Section 3161(h)(8)(A) was not applicable in denying petitioner's motion to dismiss, the court also observed (Pet. App. 91a) that "it can fairly be argued that the exclusion as applied to *this* [petitioner] *was* * * * reasonably related to the actual needs of the case and was not used as a calendar control device." Because the 124-day period of pretrial delay of which petitioner complains was reasonably related to the actual needs of the case because of to its complexity, that 124-day period was properly excludable under Section 3161(h)(8)(A).

In addition, the 124-day period of pretrial delay was properly excludable under the Speedy Trial Act because petitioner's own conduct contributed to the delay. As the court of appeals pointed out, several courts have concluded that "when [a] defendant's conduct causes or contributes to a period of delay, that time may be excluded from the running of [t]he speedy trial clock." Pet. App. 12a; see, *e.g.*, *United States* v. *Fields*, 39 F.2d 439, 442-443 (3d Cir. 1994); *United States* v. *Kucik*, 909 F.2d 206, 211 (7th Cir. 1990), cert. denied, 498 U.S. 1070 (1991); *United States* v. *Kington*, 875 F.2d 1091, 1108 (5th Cir. 1989); *United States* v.

Mentz, 840 F.2d 315, 331 (6th Cir. 1988); *United States* v. *Pringle*, 751 F.2d 419, 434-435 (1st Cir. 1984).

The record in this case (see Pet. App. 15a, 88a) shows that, after petitioner's trial was severed, his counsel explicitly asked the government to delay the start of the trial until after the summer of 1992—the precise period of delay about which petitioner now complains. The court of appeals concluded (*id.* at 15a-16a) that that request did not give rise to excludable delay because it was made to the prosecutor rather than the district court. The government, however, shares equal responsibility with the district courts for ensuring compliance with the Speedy Trial Act. Because petitioner's request for a delay of the trial beyond the summer of 1992 lulled the government into a "false sense of security," the 124-day period between the conclusion of the trial of petitioner's original co-defendants on April 2, 1992, and the unsealing of the superseding indictment on August 4, 1992, was properly excludable under the Speedy Trial Act. See *United States* v. *Pringle*, 751 F.2d at 434.

2. In any event, the court of appeals correctly decided that, in the particular circumstances of this case, the district court's failure to dismiss the superseding indictment without prejudice was harmless error.

Under the Speedy Trial Act, "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). A court reviewing a claimed Speedy Trial Act violation, however, must also abide by 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of

the record without regard to errors or defects which do not affect the substantial rights of the parties." Federal Rule of Criminal Procedure 52(a) similarly provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This Court noted in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988), that "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Hence, the mandatory dismissal provision of 18 U.S.C. 3162(a)(2) must be read in conjunction with the harmless error provisions of 28 U.S.C. 2111 and Rule 52(a).

Contrary to petitioner's contention (Pet. 18-22), this Court's decision in *United States* v. *Taylor*, 487 U.S. 326 (1988), does not preclude the harmless error analysis adopted by the court of appeals in this case. In that case, the Court merely concluded that a district court abused its discretion in dismissing an indictment with prejudice for a Speedy Trial Act violation without considering all of the factors relevant to the choice of remedy that are specified in 18 U.S.C. 3162(a)(2). *Taylor*, 487 U.S. at 335-344. The Court had no occasion in *Taylor* to consider whether harmless error analysis applies to a district court's failure to dismiss an indictment based on an erroneous ruling that no violation of the Speedy Trial Act occurred.

Nor is there merit in petitioner's claim (Pet. 22-24) that a Speedy Trial Act error is a "structural defect" that is immune from harmless error analysis. This Court has made clear that harmless error analysis is not limited simply to errors that occur during the

criminal trial itself, see *Bank of Nova Scotia* v. *United States*, 487 U.S. at 254-256; *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), and that the types of "structural defects" that are immune from harmless error analysis are those "constitutional deprivations"—such as the total deprivation of the right to counsel—without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)); see also *Bank of Nova Scotia* v. *United States*, 487 U.S. at 256-257; *United States* v. *Mechanik*, 475 U.S. at 72.

The court of appeals correctly concluded that the violation of 18 U.S.C. 3161(c)(1) in this case was subject to harmless error analysis. The error did not involve any constitutional deprivation that resulted in a "structural defect" in the trial mechanism; rather, the failure to bring petitioner to trial within 70 days was a statutory violation of the Speedy Trial Act's time limit. The violation did not affect the fact-finding process at trial, involve a right that protects fundamental values unrelated to the fact-finding process, or immunize petitioner from prosecution. To the contrary, the remedy provided by the Act—*i.e.*, dismissal of the indictment—would have had no effect on the outcome of the proceedings in this case if the district court had imposed it.

The district court had unequivocally stated that it would have dismissed the indictment without prejudice had it found a violation, and the court of appeals agreed that a dismissal with prejudice would not have been warranted. In addition, the superseding indict-

ment had been returned even before petitioner filed his motion to dismiss, and petitioner conceded in the court of appeals "that reindictment would have been inevitable" if the superseding indictment had been dismissed without prejudice. Pet. App. 19a. Because the record demonstrated that petitioner would have been in no better position had the superseding indictment been dismissed without prejudice, the court of appeals correctly concluded that the district court's failure to dismiss the superseding indictment for a violation of 18 U.S.C. 3161(c)(1) was harmless error. Because that decision does not conflict with any decision of this Court or of any other court of appeals and does not have far-reaching consequences,[4] further review is unwarranted.

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[4] There is no substance to petitioner's assertions (Pet. 17) that the court of appeals' decision "will inevitably encourage the government both to ignore the Act and to engage in brinkmanship before the district court." The court of appeals emphasized that its holding was "not a signal that affirmance of a district court's failure to dismiss an indictment on harmless error grounds, so long as a 'without prejudice' analysis is undertaken as mandated by the Act, will routinely follow." Pet. App. 19a. The court explained that "since we review the question of prejudice *de novo*, non-dismissal in the event of a violation will always risk nullifying an entire trial." *Ibid.* This Court noted in *United States* v. *Taylor*, *supra*, that "a truly neglectful attitude on the part of the Government [in complying with the Speedy Trial Act] reasonably could be factored against it in a court's consideration" of whether to dismiss an indictment with or without prejudice. 487 U.S. at 338. Moreover, as the Court noted in *Taylor*, "[t]he Speedy Trial Act also permits a district court directly to punish dilatory counsel, including a prosecutor, through a monetary fine, suspension from practice, or by filing a report with the appropriate disciplinary committee." *Id.* at 342 n.14 (statutory citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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